Supreme Court, U.S.
FILED
JAN 5 1981
MICHAEL RODAK, JR., CLERK

No. 80-908

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

VILLAGE OF HOFFMAN ESTATES,
a Municipal Corporation,

Petitioner,

vs.

VILLAGE OF BARRINGTON HILLS, a Municipal Corporation, and VILLAGE OF SOUTH BARRINGTON, a Municipal Corporation,

Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

R. MARLIN SMITH
One IBM Plaza
Suite 3100
Chicago, Illinois 60611
(312) 467-9300
Counsel for Respondent, Village of Barrington Hills

DONALD J. KREGER
208 South La Salle Street
Room 900
Chicago, Illinois 60604
(312) 346-8500
Counsel for Respondent, Village of South Barrington

WENDY U. LARSEN
ALEXANDER R. DOMANSKIS
DAVID H. KISTENBROKER
of ROSS, HARDIES, O'KEEFE, BABCOCK & PARSONS
Chicago, Illinois
ROBERT J. RUBIN
of FRIEDMAN & KOVEN
Chicago, Illinois
Of Counsel.

TABLE OF CONTENTS.

		PAGE
Table of Authorities		ii
Additional Statement of the Case		1
Summary of Argument		2
Argument		4
Point I.	The Petitioner has Failed to Carry its Burden of Showing that a Federal Question was Decided by or Presented to the Illinois Supreme Court	4
Point II.	The Decision of the Illinois Supreme Court Rests on an Independent and Adequate State Ground	5
Point III.	The Decision of the Illinois Supreme Court does not Invade any Protected Due Process Right of the Petitioner	7
Conclusion		10

TABLE OF AUTHORITIES

Cases.

American Railway Express Company v. *Kentucky,* 273 U.S. 269, 272-74 (1927) 8

Brinkerhoff-Faris Trust & Savings Co. v. *Hill,* 281 U.S. 673, 680 (1930) 8

Cardinale v. *Louisiana,* 394 U.S. 437, 438 (1969) 4

Connecticut Mutual Life Ins. Co. v. *Moore,* 333 U.S. 541, 544 (1948) 5

Crowell v. *Randell,* 35 U.S. (10 Pet.) 368, 392 (1836) ... 4

Fuller v. *State of Oregon,* 417 U.S. 40, 50 n. 11 (1974)... 4

Herb v. *Pitcairn,* 324 U.S. 117, 125 (1945)..... 7

Murdock v. *City of Memphis,* 87 U.S. (20 Wall.) 590, 626 (1874) 7

Orr v. *Orr,* 440 U.S. 268 (1979)..... 6

Paul v. *Davis,* 434 U.S. 693, 710 (1976)..... 8

People v. *Disbrow,* 16 Cal.3d 101, 545 P.2d 272, 280-81 (1976) 9

Pruneyard Shopping Center v. *Robins,* ____ U.S. ____, 100 S.Ct. 2035, 2042-43 and n. 8 (1980)..... 9

Southern Burlington NAACP v. *Township of Mount Laurel,* 67 N.J. 151, 336 A.2d 713, 725, app. dismissed and cert. denied, 423 U.S. 808 (1975) 9

State v. *Johnson,* 68 N.J. 349, 346 A.2d 66, 67 (1975) ... 9

Street v. *State of New York,* 394 U.S. 576, 582 (1969) ... 4

Suffolk Housing Services v. *Town of Brookhaven,* 91 Misc.2d 80, 397 N.Y.S.2d 302, 308-09 (1977), mod. and aff'd., 73 App.Div.2d 731, 405 N.Y.S.2d 302 (1978) 6

United States v. *Cella,* 568 F.2d 1266, 1279 n. 9 (9th Cir., 1978) 6

Village of Arlington Heights v. *Metropolitan Housing Development Corp.,* 429 U.S. 252, 262 n. 8 (1977)..... 7

Village of Barrington Hills v. *Village of Hoffman Estates,* 75 Ill.App.3d 461, 394 N.E.2d 599 (1979), rev'd., 81 Ill.2d 392, 410 N.E.2d 37 (1980) 5

Village of Hickory Hills v. *Village of Bridgeview,* 67 Ill.2d 399, 367 N.E.2d 1305 (1977) 6

Wainwright v. *Sykes*, 433 U.S. 72, 81 (1977) 7
Warth v. *Seldin*, 422 U.S. 490 (1975) 6
Williams v. *Mayor and City Council of Baltimore*, 289 U.S. 36 (1933) 8
Wilson v. *Loew's Inc.*, 355 U.S. 597, 598 (1958) 5
Zacchini v. *Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 566 (1977) 5

Constitutions

Illinois Constitution, Art. VII, §§ 6(a) 6(m) 2, 8
Illinois Constitution, Art. VII, § 7 2

Other Authorities

Brennan, William J., Jr., *Developments in Constitutional Law*, 99 N.J.L.J. 473, at 483 (June 3, 1976) 9

No. 80-908

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

VILLAGE OF HOFFMAN ESTATES,
a Municipal Corporation,

Petitioner,

vs.

VILLAGE OF BARRINGTON HILLS, a Municipal Corporation, and VILLAGE OF SOUTH BARRINGTON, a Municipal Corporation,

Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

In opposition to the petition of the Village of Hoffman Estates for a writ of certiorari, the respondents, the Villages of Barrington Hills and South Barrington, submit the following Additional Statement of the Case and Argument for consideration by the Court.

ADDITIONAL STATEMENT OF THE CASE

Only two of the six counts of the complaint involve due process claims. Count I is grounded on a claim that the rezoning in question deprives plaintiffs of due process of law

contrary to the Fifth and Fourteenth Amendments to the Constitution of the United States and Section 2 of Article I of the Constitution of the State of Illinois. Count II rests on a claim that in rezoning the property in question the petitioner here, the Village of Hoffman Estates, has exceeded its statutory authority. Count III alleges that the rezoning is inconsistent with the express purpose and intent of the zoning ordinance of Hoffman Estates. Count IV claims that the presence of an open air music theater on the property would be a public nuisance. Count V rests on the claim that the music theater is not a lawful permitted use in the Hoffman Estates zoning district in which it is located. Count VI attacks the validity of the annexation agreement on procedural due process grounds for failure to make the annexation agreement available for public inspection sooner than three and one-half hours prior to the public hearing on the agreement, and also on the ground that the agreement contains provisions that are contrary to the statutory and decisional law of the State of Illinois.

In Illinois a home rule municipality, such as South Barrington, derives its authority and powers from the state constitution unless the legislature has limited those powers in the manner prescribed by the state constitution. Illinois Constitution, Article VII, §§ 6(a) through 6(m). Non-home rule municipalities, such as Barrington Hills, have only those powers granted by law and certain specifically defined constitutional powers. Illinois Constitution, Article VII, § 7.

SUMMARY OF ARGUMENT

The decision of the Illinois Supreme Court does not rest on any federal ground, and the petitioner has failed to carry the burden of demonstrating that the issues which it requests this Court to review were presented to the Supreme Court of Illinois.

The decision of the Supreme Court of Illinois rests entirely upon an independent and adequate state ground.

A determination by the highest court of a state that political subdivisions of the state have due process rights which they may assert in litigation does not raise a federal question in the context of this case because the existence of a right to due process depends upon the existence of a protected interest in liberty or property. The question of what constitutes a "property interest" is a matter of state law. Even if the Illinois Supreme Court had rested its ruling on a due process ground, it would have amounted to no more than a determination that as a matter of state law the corporate interests of municipalities are tantamount to "property interests" that are entitled to due process protection. Moreover, the states are free to give a more expansive meaning to the due process clause of the state constitution than is required as a matter of federal constitutional doctrine.

ARGUMENT

I.

THE PETITIONER HAS FAILED TO CARRY ITS BURDEN OF SHOWING THAT A FEDERAL QUESTION WAS DECIDED BY OR PRESENTED TO THE ILLINOIS SUPREME COURT

The decision of the Illinois Supreme Court in this case does not rest on the determination of any federal question. The ruling dealt only with the showing a litigant must make as a matter of state law to qualify as an aggrieved person having a real interest in the controversy with standing to litigate the issues presented by the pleadings. This Court has held that it does not have jurisdiction to review the determination of a federal question unless it was presented to and relied upon by the court below. *Crowell* v. *Randell,* 35 U.S. (10 Pet.) 368, 392 (1836). This Court has "consistently refused to decide federal constitutional issues raised here for the first time on review of state court decisions." *Cardinale* v. *Louisiana,* 394 U.S. 437, 438 (1969), and cases cited therein at page 438.

The party seeking review by this Court has the burden of proving that the federal questions were presented to the state courts. Where, as in this case, the highest state court has failed to pass upon the federal question and gives no indication that it was ever asked to consider any federal question, it will be assumed that the omission results from a failure to present the question properly in the state court, unless the petitioner affirmatively shows that the question was presented. *Street* v. *State of New York,* 394 U.S. 576, 582 (1969); and, *Fuller* v. *State of Oregon,* 417 U.S. 40, 50 n. 11 (1974).

In its petition for certiorari, the petitioner points out that a federal question was raised by Point 6 of the Motion to Dismiss. (See, App. 24a) However, the petition contains no showing, or even a claim, that the questions it is asking this Court to review

were ever presented to the Illinois Supreme Court. Even if a question sought to be reviewed was presented to a lower state court, but was not properly preserved on appeal to higher state courts, the requirement that a federal question must have been presented to the highest state court has not been satisfied. *Connecticut Mutual Life Ins. Co.* v. *Moore,* 333 U.S. 541, 544 (1948). In this case not even the decision of the Illinois Appellate Court, in which petitioner prevailed, rested upon or made any mention of the federal questions which the petitioner seeks to have reviewed by this Court. See, *Village of Barrington Hills* v. *Village of Hoffman Estates,* 75 Ill.App.3d 461, 394 N.E.2d 599 (1979), rev'd., 81 Ill.2d 392, 410 N.E.2d 37 (1980)

The petition for certiorari filed by the Village of Hoffman Estates is insufficient because it contains no showing whatsoever that the questions which it seeks to have reviewed were in fact presented to the Illinois Supreme Court. The petitioner has simply failed to carry the burden imposed upon it by the decisions of this Court to show that it has raised the federal questions in the proceedings before the highest state court that considered the case.

II.

THE DECISION OF THE ILLINOIS SUPREME COURT RESTS ON AN INDEPENDENT AND ADEQUATE STATE GROUND

Even when a petitioner has presented a federal question which has been passed upon by the highest court of a state, this Court will still decline to review the state court decision on a petition for a writ of certiorari if an independent and adequate state ground exists for that decision. *Zacchini* v. *Scripps-Howard Broadcasting Co.,* 433 U.S. 562, 566 (1977); and, *Wilson* v. *Loew's Inc.,* 355 U.S. 597, 598 (1958). In this case the only basis for the decision of the Illinois Supreme Court was

a state ground. Specifically the Illinois Supreme Court held that as a matter of Illinois law the respondents had met the tests previously set down in *Village of Hickory Hills* v. *Village of Bridgeview,* 67 Ill.2d 399, 367 N.E.2d 1305 (1977), for determining when municipalities are sufficiently aggrieved by the zoning regulations of their neighbors to have standing to question the validity of those regulations.

The petitioner's reliance upon *Warth* v. *Seldin,* 422 U.S. 490 (1975), is mistaken. *Warth* affirmed a holding that the plaintiffs did not have standing to invoke the aid of the federal courts. So the rule which this Court announced in *Warth* has no application because the rule with respect to standing adopted by the Illinois Supreme Court in this case dealt with the state law requirements for access to the state courts. It would be novel doctrine if providing access to the state judicial system were to be held to be a denial of due process.

The state courts are not constrained by the relatively narrow rule announced in *Warth.* They are at liberty to apply more liberal rules with respect to standing, a point which the Ninth Circuit recognized in *United States* v. *Cella,* 568 F.2d 1266, 1279 n. 9 (9th Cir. 1978). For example, in *Suffolk Housing Services* v. *Town of Brookhaven,* 91 Misc.2d 80, 397 N.Y.S.2d 302, 308-309 (1977), mod. and aff'd., 63 App. Div.2d 731, 405 N.Y.S.2d 302 (1978), a New York court refused to accept the argument that *Warth* was a binding limitation on standing for the state courts and permitted plaintiffs to proceed with a state court suit that almost certainly would have been dismissed for want of standing under *Warth* had it been brought in a federal court.

Nor does *Orr* v. *Orr,* 440 U.S. 268 (1979), help the petitioner because in that case the Louisiana court had decided the case on a federal ground and this Court held that the plaintiff did have standing to maintain the action.

In this case petitioner seems to claim that the Illinois rule with respect to the standing of municipalities is constitutionally impermissible because it transgresses the federal "prudential

limitation" on standing articulated by *Warth.* But *Warth* makes it clear that its standards are for the federal courts not the state courts. The state courts are free to fashion their own rules for their own courts with respect to standing even though in some instances the state rule may be more restrictive. See, *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.,* 429 U.S. 252, 262 n. 8 (1977). The question of standing in the state courts being one of state law, there was in this case an adequate and independent state ground for the decision irrespective of the constitutional issue that this Court is now urged to review. When a state decision rests on an adequate foundation of state substantive law it is immune from review in the federal courts. *Wainwright* v. *Sykes,* 433 U.S. 72, 81 (1977); *Herb* v. *Pitcairn,* 324 U.S. 117, 125 (1945); and, *Murdock* v. *City of Memphis,* 87 U.S. (20 Wall.) 590, 626 (1874).

III.

THE DECISION OF THE ILLINOIS SUPREME COURT DOES NOT INVADE ANY PROTECTED DUE PROCESS RIGHT OF THE PETITIONER

The petitioner asks that this Court grant certiorari to consider whether one municipality may assert a federal due process claim against another municipality. The thrust of the petitioner's argument suggests that if its petition is granted, Hoffman Estates will argue that the protection of federal due process does not extend to municipalities. There is a grave difficulty with petitioner's position. If petitioner's substantive argument is sound, then its petition should not be granted because the question it has presented for review is whether, as a municipality, its federal due process rights have been invaded by the decision of the Illinois Supreme Court.

The petition for certiorari is least clear on the question of just what due process right of the petitioner has been invaded by the decision of the Illinois Supreme Court. The petitioner appears to suggest that the decision of the state court was

erroneous. However, it was settled many years ago by this Court that federal due process does not insulate litigants from erroneous or even inept decisions or afford an occasion for review of such decisions on due process grounds by this Court. *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill,* 281 U.S. 673, 680 (1930); and, *American Railway Express Company* v. *Kentucky,* 273 U.S. 269, 272-74 (1927).

Williams v. *Mayor and City Council of Baltimore,* 289 U.S. 36 (1933), does not provide a basis for the petition either, because this is not a suit by units of local government against the governmental body that created them. Indeed, South Barrington and Hoffman Estates derive their power as home rule units from the state constitution. Illinois Constitution, Article VII, §§ 6(a) through 6(m).

Moreover, the question of whether a municipality may assert a federal due process claim turns on the question of whether there has been an invasion of a protected interest in liberty or property and, unless the interest asserted is guaranteed by the Bill of Rights, such interest attains its constitutional status by virtue of the fact that it has been recognized and protected by state law. *Paul* v. *Davis,* 424 U.S. 693, 710 (1976). Thus even had the Supreme Court of Illinois grounded its decision upon the federal due process questions raised by petitioner in this Court, the opinion would have been no more than a holding that as a matter of Illinois state law the corporate interests of a municipality are tantamount to protected property interests. Such a conception of a protected property interest, even had it been explicit in the opinion of the Illinois Supreme Court, would not have raised a federal constitutional question that would be subject to review in this Court.

Were the Village of Hoffman Estates claiming that it was denied access to the state court system, then a federal due process claim might reasonably have been made. But the

petitioner appears to be arguing that the requirements of federal due process should have barred the respondents from access to the state courts. That position is not even marginally plausible because the Illinois courts are free to adopt, as a matter of state constitutional law, a more expansive view of the meaning of procedural due process than is mandated as a matter of federal constitutional law. See, for example, *Pruneyard Shopping Center* v. *Robins,* ____ U.S. ____, 100 S.Ct. 2035, 2042-43 and n. 8 (1980); *State* v. *Johnson,* 68 N.J. 349, 346 A.2d 66, 67 (1975); *People* v. *Disbrow,* 16 Cal.3d 101, 545 P.2d 272, 280-81 (1976); and, *Southern Burlington NAACP* v. *Township of Mount Laurel,* 67 N.J. 151, 336 A.2d 713, 725, app. dismissed and cert. denied, 423 U.S. 808 (1975). See also, Brennan, William J., Jr., *Developments in Constitutional Law,* 99 N.J.L.J. 473, at 483 (June 3, 1976). So even if the present petition were not otherwise insufficient, there would not be any authentic Federal constitutional question for this Court to consider.

CONCLUSION

Petitioner has failed to carry its burden of showing that it has properly reserved for review the constitutional questions it presents and the decision that it asks this Court to review is purely a ruling on the state law of standing that rests entirely on state grounds. Moreover, the federal due process questions raised by petitioner are actually illusory. Accordingly, respondents respectfully pray that this Court deny the petition for a writ of certiorari.

Respectfully submitted,

R. MARLIN SMITH
One IBM Plaza
Suite 3100
Chicago, Illinois 60611
(312) 467-9300
Counsel for Respondent, Village of Barrington Hills

DONALD J. KREGER
208 South La Salle Street
Room 900
Chicago, Illinois 60604
(312) 346-8500
Counsel for Respondent, Village of South Barrington

WENDY U. LARSEN
ALEXANDER R. DOMANSKIS
DAVID H. KISTENBROKER
of ROSS, HARDIES, O'KEEFE, BABCOCK & PARSONS
Chicago, Illinois

ROBERT J. RUBIN
of FRIEDMAN & KOVEN
Chicago, Illinois
Of Counsel.